

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WAPATO HERITAGE, LLC, a Washington Limited Liability Company; KENNETH EVANS; JOHN WAYNE JONES; and JAMIE JONES, individual residents of Washington State,

Plaintiffs,

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SANDRA D. EVANS, an individual, not a resident of Washington State; and DAN GARGAN, a citizen of Arizona,

Defendants.

NO. CV-07-0314-EFS

ORDER GRANTING AND DENYING IN
PART NON-PARTY WITNESS MARY T.
WYNNE'S MOTION FOR PROTECTIVE
ORDER

Before the Court, without oral argument, is non-party witness Mary T. Wynne's Motion for Protective Order. (Ct. Rec. [227](#).) Ms. Wynne asks the Court to limit Plaintiffs' discovery requests by 1) limiting the production of documents, 2) eliminating multiple depositions, 3) requiring compliance with Federal Rule of Civil Procedure 45, 4) requiring payment of Ms. Wynne's discovery costs by Plaintiffs, 5) restricting the disclosure of protected information, and 6) delaying Ms. Wynne's deposition. Plaintiffs oppose the motion. After reviewing the submitted material and relevant authority, as well as the Court's March 6, 2006 Order Granting and Denying in Part Discovery Motions and

1 Granting Ms. Wynne's Motion to Withdraw (Ct. Rec. [246](#)), the Court is
2 fully informed. For the reasons given below, the Court grants and denies
3 in part Ms. Wynne's motion.

4 **A. Background**

5 Ms. Wynne, who represented Defendant Sandra Evans in connection with
6 the drafting and execution of the Settlement and Release Agreement,
7 appeared as counsel for Ms. Evans in this action on September 30, 2008.
8 (Ct. Rec. [158](#).) Plaintiffs' counsel indicated a desire to depose Ms.
9 Wynne, and began discussions in early January 2009 to establish a date
10 for Ms. Wynne's deposition. Although Ms. Wynne agreed to a deposition
11 in Seattle, Washington, she objected to the January 15, 2009 subpoena
12 duces tecum.

13 On February 25, 2009, the Court held a hearing to resolve a number
14 of discovery motions and on March 6, 2006, entered an Order memorializing
15 and supplementing its oral rulings. (Ct. Recs. [240](#) & [246](#).) As indicated
16 below, the Court's Order addressed many of the issues raised by Ms.
17 Wynne's Motion for Protective Order and also granted Ms. Wynne leave to
18 withdraw as counsel in this action.

19 **B. Authority**

20 Federal Rule of Civil Procedure 26(b)(1) states:

21 Unless otherwise limited by court order, the scope of discovery
22 is as follows: Parties may obtain discovery regarding any
23 nonprivileged matter that is relevant to any party's claim or
24 defense—including the existence, description, nature, custody,
25 condition, and location of any documents or other tangible
26 things and the identity and location of persons who know of any
discoverable matter. For good cause, the court may order
discovery of any matter relevant to the subject matter involved
in the action. Relevant information need not be admissible at
the trial if the discovery appears reasonably calculated to
lead to the discovery of admissible evidence. All discovery
is subject to the limitations imposed by Rule 26(b)(2)(C).

1 Rule 26(b)(1) is interpreted broadly and is premised on the principle
 2 that “[m]utual knowledge of all the relevant facts gathered by both
 3 parties is essential to proper litigation.” *Hickman v. Taylor*, 329 U.S.
 4 495, 507 (1947); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
 5 (1978). It is the requesting party’s burden to establish that the
 6 discovery is relevant. There are, however, limits imposed on this broad
 7 discovery right. Rule 26(b)(2)(C) limits discovery if it is unreasonably
 8 cumulative or duplicative; is obtainable from another source that is more
 9 convenient, less burdensome, or less expensive; if there had been ample
 10 opportunity to obtain information by discovery; or the burden outweighs
 11 the likely benefit.

12 **C. Analysis**

13 1. Subpoena Duces Tecum

14 The Court’s March 6, 2006 Order addressed subpoena duces tecum
 15 subsections 2, 4, 5, 5a, and 7. Ms. Wynne objects to the remaining
 16 subsections, arguing that they request irrelevant and protected
 17 information.

18 a. *Previously-addressed subsections*

19 Consistent with the Court’s earlier Order, the Court finds the
 20 following documents and communications are relevant and discoverable to
 21 the extent they do not contain protected information:

22 Modified subsection 2: Any communications (either written,
 23 oral, or electronic) from August 1, 2005, to the present, which
 24 relate to the Settlement and Release Agreement and/or MA-10
 25 proceeds involving Defendant Evans, Defendant Gargan, and/or
 26 Ms. Wynne. In addition, Defendants shall disclose any
 communications (either written, oral, or electronic) from
 August 1, 2005, to the present, which relate to First Phoenix
 International or any other venture in which Defendant Evans is
 involved with either Defendant Gargan or Ms. Wynne.

1 Modified subsection 4: First Phoenix International's articles
 2 of incorporation, certificate of formation, bylaws, minutes,
 3 resolutions, and business plans from August 1, 2005, to the
 4 present.

5 Modified subsection 5: Any and all disclosures or waivers
 6 required by Washington Rule of Professional Conduct 1.8 as they
 7 relate to Ms. Wynne's representation of Sandra D. Evans.

8 Modified subsection 5a: All statements of account, checks
 9 and/or cancelled checks, and transactional documents relating
 10 to the Settlement and Release Agreement and MA-10 proceeds
 11 (deposits and transfers).

12 Modified subsection 7: All documents (written or electronic)
 13 and communications (written, oral, or electronic) that relate
 14 to the Settlement and Release Agreement or MA-10 proceeds,
 15 between August 1, 2005, to the present, by or between Defendant
 16 Evans, Defendant Gargan, or Ms. Wynne (or on their behalf) and
 17 Wright Wapato, Inc. (or on its behalf).

18 The Court agrees that Ms. Wynne as a non-party and Ms. Evans' prior
 19 counsel in the underlying events does not have the initial responsibility
 20 to produce this information and, therefore, places the initial disclosure
 21 burden on Defendants. *See Shelton v. American Motors Corp.*, 805 F.2d
 22 1323, 1327 (8th Cir. 1986). However, if Ms. Wynne is in custody or
 23 control of previously-undisclosed above-described documents or
 24 communications, Ms. Wynne is to produce the document or communication
 25 within three (3) weeks of Defendants' disclosures. If Ms. Wynne asserts
 26 a protection or privilege, she must comply with Rule 26(b) (5).

27 b. *Subsection 1*

28 Subsection 1 seeks the following information:

29 communications (including electronic documents of any kind or
 30 nature whatever) to and from the BIA (both the Colville Agency
 31 and Northwest Region), OST (Colville Agency and Northwest
 32 Region), the OFTM, the Department of Treasury of the United
 33 States, and the Colville Confederated Tribes which in any
 34 manner, however attenuated, relate or pertain to Sandra Evans
 35 for the period of time from 8/1/05 to present.

1 By limiting this request to the identified communications that relate to
2 or pertain to Sandra Evans and (a) the Settlement and Release Agreement
3 or (b) the MA-10 proceeds, the Court finds this modified subsection seeks
4 relevant information and is not overbroad. Again, Ms. Wynne need not
5 produce previously-disclosed communications. If Ms. Wynne asserts that
6 a communication is privileged, she must comply with Rule 26(b) (5).

7 c. *Subsection 3*

8 Subsection 3 demands the following:

9 [For the period of time from 8/1/05 to the present], any and
10 all Powers of Attorney (including any and all amendments
11 thereto) employment or retention or retainer agreements, any
12 fee agreements, under which or in connection with which, Sandra
13 Evans has designated you as her Attorney in Fact, or in any
14 manner whatever, however formal or informal, Sandra Evans
15 authorized, requested or ratified you to perform any services
16 of any kind or nature whatever, including without limitation
17 business services (as an agent, employee, partner, joint
18 venture or in any other manner whatever) legal services,
19 personal services, ad hoc services or any other services of any
20 kind or nature whatever.

21 The Court finds subsection 3 seeks relevant information, but is
22 overbroad. The Court modifies it as follows:

23 [For the period of time from 8/1/05 to the present], any and
24 all Powers of Attorney (including any and all amendments
25 thereto), employment or retention or retainer agreements, any
26 fee agreements, under which or in connection with which, Sandra
 Evans has designated you as her Attorney in Fact, or in any
 manner whatever, however formal or informal, Sandra Evans
 authorized, requested or ratified you to perform any services
 in connection with the Settlement and Release Agreement, MA-10
 proceeds, First Phoenix International, or any other venture in
 which Ms. Evans is involved with either Dan Gargan or yourself.

1 Accordingly, Ms. Wynne must produce any modified subsection 3 documents
2 not previously disclosed. If she asserts a protection, she must comply
3 with Rule 26(b) (5).

4 d. *Subsection 6*

5 Plaintiffs seek discovery of the following:

6 [For the period of time from 8/1/05 to the present], any and
7 all documents of any kind or nature which relate or pertain to
8 any complaint filed with any Bar Association of any state of
 the United States asserting any form of misconduct by you, in
 any matter or connection whatever.

9 The Court finds the requested information is irrelevant to this breach
10 of settlement agreement action, which includes an allegation that
11 Defendant Gargan tortiously interfered with the settlement agreement.
12 Ms. Wynne need not produce the information requested by subsection 6.

13 e. *Summary*

14 In summary, Ms. Wynne must produce any previously-undisclosed
15 documents or communications requested by the modified subpoena duces
16 tecum three (3) weeks following Defendants' disclosures.¹ If Ms. Wynne
17 withholds a document or communication on the grounds that it is
18 protected, she must comply with Rule 26(b) (5).

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22 ¹ After Defendants' disclosures, Ms. Wynne will have a clearer idea
23 as to what documents and communications she must produce. If Ms. Wynne
24 seeks relief from her three-week disclosure timeline, she must file a
25 motion, supported by a declaration setting forth specifically how many
26 pages of documents she believes she must produce and the estimated length
 of time for production.

1 2. Depositions

2 The Court earlier advised all parties that the Federal Rules of
3 Civil Procedure must be complied with and quashed the previously-issued
4 subpoena duces tecum because Plaintiffs failed to comply with Rule 45's
5 geographic and monetary requirements. If Plaintiffs intend to depose Ms.
6 Wynne, they must provide Ms. Wynne with attendance fees and mileage -
7 either to Chandler, Arizona or Seattle, Washington if Plaintiffs elect
8 to accept Ms. Wynne's offer to be deposed in Seattle. The deposition is
9 limited to seven (7) hours unless the parties stipulate otherwise or
10 Plaintiffs seek relief from the Court. Fed. R. Civ. P. 30(d).

11 3. Discovery Costs

12 Rule 45(c)(1) requires the Court to protect persons subject to a
13 subpoena duces tecum from undue burden or expense. This duty is at its
14 apex where non-parties are subpoenaed. *United States v. CBS, Inc.*, 666
15 F.2d 364, 371-72 (9th Cir. 1982) (noting that non-parties are powerless
16 to control the scope of discovery and should not be forced to subsidize
17 an unreasonable share of litigation costs). Factors to consider in
18 determining whether reimbursement of a non-party's subpoena compliance
19 expenses is appropriate are: 1) the scope of discovery; 2) the request's
20 invasiveness; 3) the extent to which responsive information was separated
21 from privileged or irrelevant material; 4) the reasonableness of the
22 claimed production costs; and 5) the strength of each party and the non-
23 party's position. *United States v. CBS, Inc.*, 103 F.R.D. 365, 367-78
24 (C.D. Cal. 1984) (citing to *CBS*, 666 F.2d at 372 n.9).

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1 Although the Court is inclined to require the parties to pay for a
2 portion - if not all - of Ms. Wynne's reasonable production costs, the
3 Court declines to make a definitive ruling at this time. The Court will
4 be in a better position to assess the relevant factors after Ms. Wynne
5 has produced the documents and submitted a motion for production costs
6 with an accompanying declaration setting forth the time and expenses
7 incurred on various tasks, including whether Ms. Wynne ought to have been
8 organizing relevant documents at an earlier time. The Court will also
9 then assess which parties will pay for Ms. Wynne's reasonable production
10 costs.

11 4. Summary

12 The Court grants and denies in part Ms. Wynne's motion. Ms. Wynne
13 must produce the above-identified documents within three (3) weeks of
14 Defendants' disclosures. Plaintiffs may take Ms. Wynne's deposition;
15 however, they must comply with Rules 45 and 30. The Court will determine
16 what parties are responsible for paying Ms. Wynne's reasonable production
17 costs upon Ms. Wynne's filing of a motion seeking such relief following
18 the production of documents

19 **D. Conclusion**

20 For the reasons given above, **IT IS HEREBY ORDERED:** Mary T. Wynne's
21 Motion for Protective Order (**Ct. Rec. 227**) is **GRANTED AND DENIED IN PART.**

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IT IS SO ORDERED. The District Court Executive is directed to enter this Order and to provide copies to counsel.

DATED this 17th day of March 2009.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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